# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TORRI LAMAN BERRY,

Defendant-Appellee.

UNPUBLISHED
February 12, 2008

No. 270383
Ingham Circuit court
LC No. 05-000833-FC

Before: Markey, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant appeals by right from his convictions following a jury trial of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.11a(2), and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to serve consecutive prison terms of 20 to 40 years for both armed robbery and first-degree home invasion, consecutive to two concurrent terms of 2 years on each count of felony-firearm. We affirm.

Defendant first argues that the evidence was insufficient to support his convictions for aiding and abetting felony-firearm. We review a sufficiency of evidence claim de novo to determine whether the evidence, when viewed in the light most favorable to the prosecution, would justify a rational trier of fact in finding that all the elements of the crime were proven beyond a reasonable doubt. *People v Lange*, 251 Mich App 247, 250; 650 NW2d 691 (2002).

Defendant cites *People v Johnson*, 411 Mich 50, 54; 303 NW2d 442 (1981) to support his argument that to prove a defendant guilty of felony-firearm based on accomplice liability, the prosecutor may not merely show that the defendant encouraged an accomplice to use a gun during a felony but must show that the defendant aided or abetted the accomplice in obtaining or retaining the firearm for commission of the felony. However *People v Moore*, 470 Mich 56, 68-69; 679 NW2d 41 (2004), expressly overruled *Johnson*:

> Establishing that a defendant has aided and abetted a felony-firearm offense requires proof that a violation of the felony-firearm statute was committed by the defendant or some other person, that the defendant performed acts or gave encouragement that assisted in the commission of the felony-firearm violation,

> and that the defendant intended the commission of the felony-firearm violation or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement. [*Id*. at 70-71.]

Considering the evidence in the light most favorable to the prosecutor, the evidence was sufficient to support a finding that defendant aided or abetted a violation of the felony-firearm statute. The jury could have concluded that the gunman committed felony-firearm because eyewitnesses testified that the gunman threatened the victims with a firearm and ordered the two of them to open a home safe at gunpoint. Further, defendant himself told the victim who actually opened the safe that she would be shot if she did not open it. Indeed, he threatened her with a countdown that implied she was only seconds away from being shot. Thus, defendant committed acts and gave encouragement that assisted his accomplice in violating the felony-firearm statute. Indeed, defendant "specifically used his confederate's possession of that firearm to intimidate and rob" the victims. *Id.* at 73. The evidence was also sufficient to establish that defendant at least knew the gunman intended to commit a felony-firearm violation at the time defendant assisted him: Even before defendant threatened the woman who opened the safe, the gunman threatened all the victims with the firearm in defendant's presence and specifically threatened to shoot the first victim who tried to open the safe in a voice loud enough to be heard in the room where defendant was located. Accordingly, defendant's argument that the evidence was insufficient to support his felony-firearm conviction is without merit.

Defendant next argues that the photographic lineups shown to unspecified witnesses should not have been admitted because the process used was unduly suggestive. It is clear from his argument that he is referencing witnesses Chi Lau, Kamlan Lau, and Ling Chang. Defendant argues that the process was unduly suggestive because there is no way to know whether the Laus and Chang were given and understood an admonishment written at the top of the photographic lineups given their limited understanding of English and because the witnesses may have, without the knowledge of the police officers present, improperly spoken with each other in Chinese about the lineups. This argument incorrectly places the burden on the prosecutor to show that the witnesses were given the proper admonishment and that they did not improperly share information. However, it is defendant who "must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *People v Kurylczyk*, 443 Mich 289, 302-303; 505 NW2d 528 (1993).

By suggesting in the question presented that one witness (Mrs. Lau) translated to the *victims* the written admonishment, defendant suggests that Mrs. Lau translated the admonishment to all eyewitnesses who identified defendant in court. But Mrs. Lau only translated the written admonishment to Mr. Lau (and possibly to her mother-in-law, who apparently did not identify defendant). A police officer actually read the admonishment aloud to Chang, and there is no indication or argument that Chang did not fully understand spoken or written English. Indeed, Chang testified before the jury without an interpreter. Further, there is no evidence that the argument that the witnesses spoke to each other in Chinese implicates Chang because defendant has not shown that Chang was involved in such a conversation. Defendant has not established plain error with respect to the admission of the photographic lineup viewed by Chang. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

As for Mr. and Mrs. Lau, the record shows that Mrs. Lau spoke some English. Further, a police officer testified that when she read the admonishment to Mrs. Lau, she appeared to have no problem understanding it. Mrs. Lau did indicate at trial that she needed an interpreter; however, this also demonstrated that she has the ability to ask for language help when she needed to. Additionally, when asked if she "expect[ed] to see the picture of one of the people at the house" when she looked at the photographic lineup, she responded, "At the police station they want me to see if these three guys are among those in the pictures." The use of the uncertain conjunction "if" shows that she understood that the perpetrator(s) might not be in the lineup. Also, the fact that she only identified one photograph when she was looking to see "if these *three* guys are among those in the pictures" shows that she understood that the lineup may or may not have the perpetrators displayed. Moreover, the conversation between Mrs. Lau and her husband occurred after her identification; consequently, it could not have influenced it. Therefore, defendant fails to establish plain error with respect to the admission of the photographic lineup viewed by Mrs. Lau.

Mr. Lau testified that he understood some English, and his ability to speak and understand English is shown by the events of the robbery itself. But there is some evidence to suggest that Mr. Lau might not have understood the admonishment. Nonetheless, any possible problems with the translation of the admonishment do not amount to error requiring reversal. Indeed, Mr. Lau did identify defendant in the photographic lineup, and defendant conceded in closing argument that he admitted in a videotaped interview played for the jury that he was at the scene of the robbery. The fact that defendant disputed that he entered the house and took part in the robbery is an issue of witness credibility related to the events of the crime not on whether defendant was at the home.

Citing *People v Kachar*, 400 Mich 78, 91; 252 NW2d 807 (1977), defendant also argues that the in-court identifications of these three witnesses should have been suppressed because they were the product of unduly suggestive photographic lineups. This argument was not presented below. Having failed to establish that the photographic lineups were unduly suggestive, defendant cannot sustain this argument. In any event, defendant conceded his presence at the home on the night of the robbery.[1]

Finally, defendant raises an unpreserved allegation that the prosecutor engaged in misconduct at trial. Specifically, defendant argues that the prosecutor improperly told the jury how to conduct its deliberations by asking a potential juror if he would be willing to articulate any doubts he had for his fellow jurors to determine whether his doubt was reasonable. Defendant also argues that the prosecutor vouched for the credibility of police witnesses when he asked a juror that although there would be allegations that the police did not do their jobs properly, "[D]o you think it's appropriate to give our police some benefit for knowing their jobs

[1] Defendant also makes much of the fact that defendant purportedly had a large and visible growth on his ear that none of the witnesses saw. Assuming defendant has such a growth, there was also eyewitness testimony that defendant had been wearing a hat. The jury was in the best position to view defendant's physical appearance and determine whether a hat would have covered this allegedly distinguishing characteristic.

the same as you gave the bridge builder?" After the juror responded affirmatively, the prosecutor posed the question to the entire panel, asking if anyone had "a problem" with such a presumption. The transcript does not reflect any response from the panel. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005).

Regarding the first alleged impropriety, it seems clear that the prosecutor was attempting to articulate a manner in which a doubt about guilt could be evaluated in order to determine whether it is, as the court itself later instructed, "not merely an imaginary or possible doubt, but a doubt based on reason and common sense." Strictly speaking, there is no requirement that in order for a doubt to be reasonable it must be capable of articulation. But to the extent that this line of questioning was improper, any possible confusion could have been alleviated by a timely curative instruction. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

The questioning about police officers being given the benefit of the doubt with respect to knowing their job is tautological. In any event, to the extent that the questioning hinted that a police officer's testimony warrants deference, such an inference was effectively countered by the court's instruction that the testimony of police officers "is to be judged by the same standard you use to evaluate the testimony of any other witness." "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

We affirm.

/s/ Jane E. Markey
/s/ Patrick M. Meter
/s/ Christopher M. Murray